A **ALLIANCE BANK MALAYSIA BHD**

v.

SAIL YALANG

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI JC
[CIVIL APPEAL NO: K12-18-2009]
12 OCTOBER 2009

C ***CONTRACT:*** *Guarantee - Forgery - Whether appellant proved respondent executed second guarantee - Purported witness of execution of second guarantee not called as a witness - Only evidence of witness' signature on second guarantee led*

D ***EVIDENCE:*** *Burden of proof - Forgery of signature - Burden on appellant to prove respondent's execution of second guarantee - Burden on respondent to prove forgery - Appellant not relieved of duty of proving facts necessary to establish respondent's liability - Section 101 Evidence Act 1950*

E ***EVIDENCE:*** *Proof of debt - Respondent liable under first overdraft facility only - Appellant combined both overdraft facilities and operated under one account - No evidence to show outstanding amount under first overdraft facility*

F ***EVIDENCE:*** *Conclusive evidence clause - Guarantee - Reliance on judgment entered by appellant against borrower as conclusive of guarantor's debt - Judgment sum was for total debt under both overdraft facilities - Still did not address how much borrower owed under first overdraft facility*

G Sabah Bank Berhad granted the borrower, Rich Zone Sdn Bhd ('Rich Zone') a RM180,000 overdraft facility ('the first overdraft facility') which was secured by a Letter of Guarantee dated 24 December 1993. Sabah Bank Berhad later offered a further overdraft facility in the sum of RM50,000 to Rich Zone ('the
H second overdraft facility') which was secured by a second Letter of Guarantee dated 7 February 1994. The respondent was one of two guarantors to the two overdraft facilities. The appellant became the successor in title to Sabah Bank Berhad pursuant to a Vesting Order dated 21 November 2000. Rich Zone defaulted in servicing
I the overdraft facilities and the appellant filed the present action against both Rich Zone and the guarantors in the sessions court at

Kota Kinabalu. On 24 July 2004 judgment in default was entered against Rich Zone and both guarantors in the sum of RM58,243.21 together with agreed interest at the rate of 9.9% per annum from 1 May 2002 to the date of full payment. The respondent succeeded in setting aside the judgment entered against him on 26 September 2008 but the judgment against the borrower Rich Zone remained. At the conclusion of the trial the learned trial judge found the respondent liable in respect of the first Letter of Guarantee but not on the second Letter of Guarantee. She awarded nominal damages of RM10 to the appellant as she found that the amount of loss suffered in respect of the first overdraft facility (in relation to which the respondent was held liable under the first Letter of Guarantee) was not proved. The appellant appealed against the trial judge's finding that the respondent was not liable on the second Letter of Guarantee.

Held (dismissing the appeal with costs):

(1) There was no justification to interfere with the learned trial judge's finding that there was no evidence to support the appellant's pleaded case that the respondent executed the second Letter of Guarantee. PW1's evidence that the witness' signature on the second Letter of Guarantee belonged to Francis C.K. Liong was not proof that the respondent executed the second Letter of Guarantee and in the presence of Francis C.K. Liong. (paras 7 & 8)

(2) There was no merit on the appellant's contention that the learned trial judge erred in law in placing the burden of proof on the appellant to prove execution of the second Letter of Guarantee. Since it was the appellant who desired the court to give judgment on the respondent's liability under the second Letter of Guarantee it was incumbent on the appellant to prove that the second Letter of Guarantee was executed by the respondent. The question of proving forgery did not arise in the absence of such evidence and in the absence of any admission by the respondent that the second Letter of Guarantee was executed by him. It made no difference that the respondent did not plead *non est factum*. Although the agreed issue to be tried was whether the signature appearing on the second Letter of Guarantee was a forgery this did not relieve the appellant of the burden of proving its assertion that the second Letter of

A Guarantee was executed by the respondent. The appellant's argument that even if the burden of proof lay on the appellant, the burden had been discharged having regard to the surrounding circumstances was rejected as the points raised were speculative and fell short of discharging the legal burden of B proof which lay on the appellant. (paras 13-19)

(3) The learned trial judge's reasoning that as there was no evidence on the exact amount outstanding and owing under the first overdraft facility the appellant had failed to prove the quantum C of indebtedness under the first Letter of Guarantee, was right. In the absence of evidence to show how much the borrower owed under the first overdraft facility, the court could not determine the actual amount of loss suffered by the appellant. (paras 22 & 23)

D **(4)** Although the judgment in default entered against Rich Zone was not produced at the trial and the issue concerning clause 19 was neither pleaded nor canvassed at the trial, the trial judge should have given effect to them as the judgment was not disputed by the respondent and the first Letter of Guarantee E was already before the court and was referred to by witnesses during the trial. Nevertheless, cl. 19 was of no avail as the judgment which was to be binding and conclusive on the respondent was the total debt owing under both the first and second overdraft facilities and not only the debt owing under the F first overdraft facility. Accordingly the appeal was dismissed with costs. *Cempaka Finance Bhd v. Ho Lai Ying & Anor* (refd); *Orix Credit Malaysia Sdn Bhd v. M/S Belquip Sdn Bhd & Ors* (refd); *Haron v. Macaulay* (foll). (paras 27-33)

G **Case(s) referred to:**
Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(refd)***
Citibank NA v. Ooi Boon Leong & Ors [1980] 1 LNS 168 FC ***(refd)***
Haron v. Macaulay [1968] 1 LNS 47 FC ***(foll)***
Lionel Edwards Ltd v. State of West Bengal AIR [1967] Cal 191 ***(refd)***
H *Orix Credit Malaysia Sdn Bhd v. M/S Belquip Sdn Bhd & Ors [2007] 9 CLJ 15 HC* ***(refd)***
Watt or Thomas v. Thomas [1947] AC 484 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 58(1), 101, 102, 103

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Other source(s) referred to:
Evidence, Practice and Procedure, 3rd edn 2003, p 536
Sarkar on Evidence, 15th edn, p 1451

For the appellant - Saiful Azian Mokhtar; M/s Jayasuriya Kah & Co
For the respondent - Saban Sawayan; M/s Saban Sawayan & Co

Reported by Susheila Sreedharan

JUDGMENT

Abdul Rahman Sebli JC:

The Facts

[1] The facts giving rise to this appeal can be summarized as follows. By letter of offer dated 22 December 1993, Sabah Bank Berhad offered to the borrower, Rich Zone Sdn Bhd ("Rich Zone") an overdraft facility in the sum of RM180,000 ("the first overdraft facility"). The first overdraft facility was secured by a letter of guarantee dated 24 December 1993. By a subsequent letter of offer dated 4 February 1994, Sabah Bank Berhad offered a further overdraft facility in the sum of RM50,000 to Rich Zone ("the second overdraft facility"). The second overdraft facility was secured by a second letter of guarantee dated 7 February 1994. The respondent was one of two guarantors to the two overdraft facilities.

[2] The appellant became the successor in title to Sabah Bank Berhad pursuant to a vesting order dated 21 November 2000. When Rich Zone defaulted in servicing the overdraft facilities, the appellant filed the present action against both Rich Zone and the guarantors in the Sessions Court at Kota Kinabalu. On 24 July 2004 judgment in default was entered against Rich Zone and both guarantors in the sum of RM58,243.21 together with agreed interest at the rate of 9.9% per annum from 1 May 2002 to the date of full payment. The respondent succeeded in setting aside the judgment entered against him on 26 September 2008 but the judgment against the borrower Rich Zone remains.

[3] At the commencement of the trial the agreed issues to be tried were as follows:

(1) Whether the signature of the respondent appearing in the letter of guarantee dated 24 December 1993 was a forgery.

(2) Whether the signature of the respondent appearing in the letter of guarantee dated 7 February 1994 was a forgery.

(3) If the signatures of the respondent as appearing in both letters of guarantee are not forgeries, whether the respondent is liable for the debt of Rich Zone.

[4] At the conclusion of the trial the learned trial judge found issue (1) in favour of the appellant. She was satisfied that the respondent did sign the first letter of guarantee. However on issue (2) she found that the appellant failed to prove that the respondent executed the second letter of guarantee. Accordingly she found the respondent liable in respect of the first letter of guarantee but not on the second letter of guarantee. She awarded nominal damages of RM10 to the appellant as she found that the amount of loss suffered in respect of the first overdraft facility (in relation to which the respondent was held liable under the first letter of guarantee) was not proved. The RM10 was merely to serve as a peg on which to hang costs.

[5] The appellant's appeal is against the learned trial judge's finding in respect of issue (2) and her finding that the amount of loss had not been proved. The appellant's grounds of appeal against the learned trial judge's finding on issue (2) are in paras 1 and 2 of the petition of appeal. They are as follows:

> 1. The learned Sessions Court Judge erred in law and in fact in holding that the Appellants have failed to prove on the balance of probabilities that the Letter of Guarantee dated 7th February 1994 was executed by the Respondent/3rd Defendant herein.
>
> 2. In arriving at the said conclusion, the Learned Sessions Court Judge erred in law and in fact by failing to review all available evidence in particular the unchallenged testimony of PW-1 (Jeffrey Chu Wee Ming) as well as the surrounding circumstances of the case.

[6] Clearly these grounds are against the finding of fact made by the learned trial judge. The principles on appellate interference with findings of fact by the trial court are well established. The appellate court will only interfere if the findings are perverse or that the trial court had misappreciated the evidence or had acted on wrong principles. In the House of Lords decision in *Watt or Thomas v. Thomas* [1947] AC 484 Viscount Simon said:

> ... an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight.

[7] In the present case the learned trial judge found no evidence to support the appellant's pleaded case that the respondent executed the second letter of guarantee. On the evidence before her or rather the lack of it I find no justification to interfere with such finding of fact. The execution of the second letter of guarantee was purportedly witnessed by one Francis C.K. Liong but he could not be found and so was not called as a witness. In the absence of Francis C.K. Liong the appellant called Jeffry Chu Wee Ming (PW1) to prove that the second letter of guarantee was signed by the respondent in the presence of Fancis C.K. Liong. According to PW1 the signature of the witness appearing on the second letter of guarantee is the signature of Francis C.K. Liong. He said he is acquainted with the signature of Francis C.K. Liong as they were partners for more than 13 years.

[8] In my view evidence that the witness' signature on the second letter of guarantee belongs to Francis C.K. Liong is neither here nor there. It is certainly not proof that the respondent executed the second letter of guarantee and in the presence of Francis C.K. Liong. The evidence of PW1 proves nothing beyond the fact that the signature of the witness belongs to Francis C.K. Liong.

Burden Of Proof

[9] In her deliberation on issue (2) the learned trial judge held the view that since the appellant failed to prove that the respondent executed the second letter of guarantee the question of the respondent proving forgery of his signature did not arise. Learned counsel for the appellant submitted that in so deciding the learned trial judge had fallen into error on the burden of proof.

[10] Counsel's contention is that since the respondent alleged that his signature on the second letter of guarantee was forged, the burden was on him to prove the allegation and not for the appellant to prove that the respondent executed the second letter of guarantee.

[11] Learned counsel drew the court's attention to s. 103 of the Evidence Act 1950 ("the Act") to support of his contention. This provision deals with proof of a particular fact and provides as follows:

> 103. Burden of proof as to particular fact.
>
> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any particular person.

[12] What learned counsel's submission amounts to is this: Since the respondent bears the burden of proving forgery, the appellant is relieved of the burden of proving execution of the second letter of guarantee. With due respect to learned counsel he is reversing the onus of proof – instead of the appellant proving execution of the second letter of guarantee it is for the respondent to prove that he did not execute it. If learned counsel is right, all that the appellant needs to do to establish liability is to produce the second letter of guarantee without proving who executed it, then fold its arms and watch as the respondent discharges his burden of proof. That cannot be a correct proposition of law. The burden being on the respondent to prove forgery merely means that the appellant has no duty to prove that there was no forgery. It cannot be extended to mean that the appellant is relieved of the duty of proving all facts necessary to establish the respondent's liability.

[13] Since it is the appellant who desires the court to give judgment on the respondent's liability under the second letter of guarantee it is incumbent on the appellant to prove that the second letter of guarantee was executed by the respondent. The question of proving forgery does not arise in the absence of such evidence and in the absence of any admission by the respondent that the second letter of guarantee was executed by him. It makes no difference that the respondent did not plead *non est factum*.

[14] It is true, as pointed out by learned counsel, that the agreed issue to be tried was whether the signature appearing on the second letter of guarantee was a forgery but in my view this does not relieve the appellant of the burden of proving its assertion that the second letter of guarantee was executed by the respondent. In fact the appellant sought to establish this fact by calling PW1 to prove that the second letter of guarantee was executed by the respondent. The appellant cannot now say that it has no duty to prove that fact merely because the learned trial judge did not find in its favour.

[15] There can be no dispute that the respondent's liability depends on the existence of the appellant's assertion that he executed the second letter of guarantee. Clearly therefore the burden of proof lies on the appellant by virtue of s. 101 of the Act which provides:

> 101. Burden of proof.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[16] It is not for the respondent to prove in the negative that he did not execute the second letter of guarantee. If no evidence were given on either side to prove execution of the second letter of guarantee the appellant's claim would fail: see s. 102 of the Act. It is only after the appellant has established by *prima facie* evidence that the second letter of guarantee was executed by the respondent that the burden of proving forgery could arise. In their commentary on the principle and scope of s. 102 of the Indian Evidence Act which is in *pari materia* with s. 102 of the Act the learned authors of *Sarkar on Evidence,* 15th edn have this to say at p. 1451:

> S. 102 makes it clear that the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to relief, the onus shifts on to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same (*Basiruddin v. Sahebulla*, 32 CWN 160).

[17] There is therefore no merit in the appellant's contention that the learned trial judge erred in law in placing the burden of proof on the appellant to prove execution of the second letter of guarantee.

A **[18]** It was then argued by learned counsel that even if the burden of proof lies on the appellant, the burden has been discharged having regard to the following surrounding circumstances which learned counsel says supports the appellant's contention that the respondent did sign the second letter of guarantee and that the
B allegation of fraud is inconsistent with the contemporaneous documents:

(i) The respondent did sign the first letter of guarantee.

C (ii) The respondent did not protest when issued with the letter of demand and did not make any payment after the demand.

(iii) The respondent was the director of the borrower, Rich Zone and would sign documents which his employer Datuk Lim Chor Hen asked him to sign.

D

(iv) The respondent was also sued in another case which tends to show that it was very likely that he might have stood as guarantor for the same borrower, Rich Zone on other occasions.

E **[19]** On this issue I need only say that the points raised are speculative and fall short of discharging the legal burden of proof which lies on the appellant. It is true that the learned trial judge found the respondent to be an evasive, difficult and untruthful witness but that was in the context of the respondent's evidence in
F relation to the first letter of guarantee, which the learned trial judge ultimately found in favour of the appellant.

Whether Quantum Of Loss Proved

[20] Since the appellant only succeeded in proving liability in
G respect of the first letter of guarantee and not the second, the question is whether the amount of loss suffered in respect of the first overdraft facility has been proved. The learned trial judge found that there is no evidence to show the actual amount owed under the first letter of guarantee in respect of which the respondent was
H liable. She therefore found that the loss suffered was not proved.

[21] The appellant relied on the testimony of Teresa Manjaji (PW2), the Group Special Assets Manager of the appellant Bank to prove the loss suffered. Her evidence is that the two overdraft
I facilities totalling RM230,000 were combined and operated under one current account maintained by the same borrower, ie, Rich

Zone. However PW2 did not say how much was owed under the first facility and how much under the second facility. She merely said that the sum of RM58,243.21 claimed by the appellant is the amount due and owing under both overdraft facilities. The learned trial judge dealt with the issue in this manner:

> As I said, there is no evidence of how much that is. The plaintiff had quite ingeniously argued that since the liability of the 3rd defendant up to the first RM180,000.00 is covered by the 1st Letter of Guarantee, the 3rd defendant's liability under this summons is under the 1st Letter of Guarantee only because the amount claimed by the plaintiff is less than RM180,000.00. In my judgment, such argument has no force to it in the face of the categorical sworn evidence of PW2 in court. She stated in no uncertain terms that the sum of RM58,243,21 as at April 2002 (the claim in the present action) was the amount due and owing under both overdraft facilities. She reinforced that stance when she stated that the demand issued by the bank's solicitors *vide* the letter of 16 May 2002 was for the amount due and owing under both overdraft facilities. The plaintiff cannot run away from the evidence and it is that the RM58,243.21 that is claimed by the plaintiff is the amount due on both overdraft facilities. Since there is no evidence as to what exactly is the amount outstanding and owing under the first draft facility, I found and held that the plaintiff had failed to prove the quantum of indebtedness under the first Letter of Guarantee.

[22] I find nothing wrong with the learned trial judge's reasoning as reproduced above. On the contrary I think she is clearly right. The two overdraft facilities may be operated under one account and maintained by the same borrower but they involved two different amounts secured by two separate letters of guarantee and executed on two different dates. The respondent would be liable for the sum claimed if he had been held liable under both letters of guarantee. But here the respondent was only held liable under the first letter of guarantee. Therefore his liability is limited to the debt in respect of the first overdraft facility and cannot be extended to the second overdraft facility.

[23] In the absence of evidence to show how much the borrower owed under the first overdraft facility, how is the court to determine the actual amount of loss suffered by the appellant? To lump together the debts under the first and second facilities and ask the respondent to pay for the combined amount would be to expect the respondent to assume responsibility for both facilities when his

liability is only in respect of the first facility. That cannot be what the respondent bargained for when he executed the first letter of guarantee.

The Certificate Of Indebtedness

[24] It was next contended by learned counsel for the appellant that since judgment had been entered against the borrower in the sum of RM58,243.21, the appellant could rely on cl. 19 of the first letter of guarantee to prove that the loss suffered was in the sum of RM58,243.21. Clause 19 of the first letter of guarantee is couched in the following terms:

> any judgment recovered by the Bank against the customer in respect of such indebtedness shall be binding and conclusive against the surety's executor, administrators and legal representatives in all courts of law and elsewhere.

[25] In the Federal Court case of *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544 Steve Shim CJ (Sabah and Sarawak) after referring to a passage in *Citibank N.A. v. Ooi Boon Leong & Ors* [1980] 1 LNS 168 said this:

> The above *dictum* establishes firmly the conclusive nature and extent of a certificate of indebtedness. A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claimed.

[26] In applying *Cempaka Finance* Wong Dak Wah J in in *Orix Credit Malaysia Sdn Bhd v. M/S Belquip Sdn Bhd & Ors* [2007] 9 CLJ 15 said:

> There was no requirement on the part of the plaintiff to adduce evidence to prove quantum and the correctness of the amount claimed if the judgment in default against the first defendant was produced.

[27] In the instant case the learned trial judge declined to give effect to cl. 19 of the first letter of guarantee on the ground that the judgment in default entered against Rich Zone was not produced at the trial. The other reason is that the issue concerning cl. 19 was neither pleaded nor canvassed at the trial.

[28] I must with respect disagree with the learned trial judge on this point. Although the judgment entered against Rich Zone was not produced at the trial it was not disputed by the respondent and this is evidenced by para. 12 of the agreed facts which reads:

> Judgment was entered against the 1st, 2nd and 3rd Defendants on 24th July 2004 in the sum of RM58,243.21 together with agreed interest at the rate of 9.9% per annum from 1st May 2002 to the date of full payment.

[29] A fact that is agreed need not be proved: see s. 58 (1) of the Act which provides:

> 58. Facts admitted need not be proved.
>
> (1) No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing or which before the hearing they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:
>
> Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

[30] In *Haron v. Macaulay* [1968] 1 LNS 47 the former Federal Court held that the appellant in that case was bound by the admissions made by counsel who represented him, and the question of quantum should be approached on the basis of those admissions. Although the decision in that case concerns an admission by counsel I am of the view that it applies equally well to a situation where the facts are agreed by the parties.

[31] In *Evidence, Practice and Procedure* 3rd edn (2003) the learned authors at p. 536 referred to the case of *Lionel Edwards Ltd v. State of West Bengal* AIR [1967] Cal 191 where AK Das said in relation to admitted documents:

> Documents are either proved by witnesses or marked on admissions. When it is marked on admission without reservation, the contents are not only evidence but are taken as admitted the result being, the contents cannot be challenged either by way of cross examination or otherwise ...

[32] Be that as it may I am of the view that the appellant's reliance on cl. 19 of the first letter of guarantee is of no avail as it still does not answer the question of how much the borrower owed

under the first overdraft facility. As alluded to earlier the appellant bank itself through PW2 admitted that the sum of RM58,243.21 claimed by the appellant in the present action (which is the judgment sum obtained against the borrower) is the total debt owing under both the first and second overdraft facilities and not only the debt owing under the first overdraft facility. That means the amount claimed includes the borrower's debt under the second overdraft facility in respect of which the respondent has not been held to be liable.

[33] As for the learned trial judge's refusal to entertain the appellant's argument on cl. 19 of the first letter of guarantee on the ground that the matter was neither pleaded nor canvassed at the trial it must be noted that the first letter of guarantee was already before the court (agreed bundle) and was referred to by witnesses during the trial. The appellant was therefore entitled to submit on the terms and conditions of the first Letter of Guarantee and that includes clause 19.

Conclusion

[34] For reasons stated above it is clear to me that the learned trial judge had not erred in finding that the appellant failed to prove execution of the second letter of guarantee and also the amount of loss suffered by the appellant in respect of the first overdraft facility. Neither has she erred on the burden of proof. In the circumstances the appeal was dismissed with costs.